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CIMB BANK BHD

v.

MUTHUSAMY SINNAKAUNDAN

B

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[ORIGINATING SUMMONS NO: 24(HT)-44-2005]
12 SEPTEMBER 2008

C ***LAND LAW:*** *Charge - Order for sale - Cause to the contrary - Whether there was failure to comply with mandatory requirements of O. 83 r. 3 Rules of the High Court 1980 - National Land Code, s. 256(3)*

D The plaintiff, as chargee of the defendant's land, applied for an order for sale under s. 256 of the National Land Code and O. 83 of the Rules of the High Court 1980 ('the RHC'). It was the plaintiff's case that the defendant was in arrear of a term loan granted by the plaintiff in the sum of RM244,702.37 and overdraft facilities amounting to RM238,074.62. In consideration of the said loans, the defendant executed a first party charge over his land E ('the said lands'). The defendant defaulted in repaying the said loans. The plaintiff commenced this action to enforce the statutory charge by way of order for sale. The defendant, however, challenged that the plaintiff had failed to adhere to the requirements of O. 83 r. 3 of the Rules of the High Court 1980 F which requires that the account between the chargor and the chargee must show the 'amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit.' According to the defendant, the plaintiff had failed to come up with an accurate and firm accounts of his loans. G The defendant submitted he was left in confusion as to what was the exact amount he was legally liable to pay. The defendant also challenged the Form 16D notice and claimed that his accounts were manipulated by the plaintiff's own officials. The defendant further deposed that the sum claimed *vide* the Form 16D notice H dated 6 December 2004 was inaccurate as it was based upon fraudulent and manipulated accounts, compounded by the plaintiff's refusal to give him his current statement of accounts, of which the defendant was perfectly entitled to have sight of the same.

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Held (dismissing plaintiff's application):

(1) The figures given by the plaintiff made no real sense. It was illogical for the amount of the loan repaid to have decreased to RM74,707.30 about eight months after the accounts was first given through the affidavit in support. No explanation was given to account the differences and learned counsel for the plaintiff made no submissions on this issue. It appeared that the plaintiff took the liberty to change the sum repaid at its own whims and fancies. The accounts given by the plaintiff was full of ambiguities, lending credence to the defendant's claim that his account had been manipulated by the plaintiff's own officials. Since the plaintiff did not issue a certificate of indebtedness, the defendant's accounts as indicated by the plaintiff through the affidavits was thus not conclusive and liable to be challenged. The plaintiff was thus in breach of the requirements of O. 83 r. 3 of the Rules of the High Court 1980. The accounts given by the plaintiff was bad in law, incapable of being given due recognition for purposes of enforcing the charge. (para 7 & 8)

(2) The plaintiff elected not to give reasons for its refusal to provide the defendant his full statement of accounts of the said loans. Also, there were clear indications that there was some truth in the defendant's allegations but the plaintiff elected not to reply point for point. Apparently the plaintiff's behaviour left much to be desired. As said earlier, it lent credence to the defendant' claim that his accounts had been manipulated and that the amount claimed in the notice was inaccurate as it was based upon fraudulent and manipulated accounts. For all the reasons given, the defendant had successfully established existence of cause to the contrary to resist the order for sale of the said land pursuant to the charge sought by the plaintiff within the requirements of s. 256(3) of the NLC. (paras 13, 14 & 15)

Case(s) referred to:

Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 1 LNS 33 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Sathunavakey v. Oriental Bank Bhd [2008] 1 CLJ 345 CA ***(refd)***

Legislation referred to:

National Land Code, s. 256(3)

Rules of the High Court 1980, O. 83 r. 3(3)(b), (c), (d)

A *For the plaintiff/appellant - Mona Sheikh Abdullah; M/s Tam Cheng Yau & Co*
For the defendant/respondent - Firus Said; M/s Rugber Singh & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Ahmadi Asnawi JC:

[1] The plaintiff as chargee of the defendant's land, applied for
C an order for sale under s. 256 of the National Land Code 1965 ("the NLC") and O. 83 of the Rules of the High Court 1980 ("the RHC") *vide* saman pemula (Lampiran 2) and its supporting affidavit affirmed on 20 January 2005 (Lampiran 3).

D **[2]** It was the plaintiff's case that as upon the date of the filing of the saman pemula, the defendant was in arrear of a term loan granted by the plaintiff in the sum of RM244,702.37 and overdraft facilities amounting to RM238,074.62. The terms of the said loans in full are as shown in exh. SBC1 of the plaintiff's affidavit
E pembetulan (Lampiran 17). In consideration of the said loans the defendant executed a first party charge over his land known as H.S. (D) 32478 PTD 6545, Mukim Simpang Kanan, Daerah Batu Pahat, Negeri Johor Darul Ta'zim ("the said lands"). The said charge was subsequently registered on 5 March 1997 *vide*
F Gadaian Perserahan No. 14390/97, Jilid No. 3872, Folio No. 73.

[3] On account that the defendant had defaulted in repaying the said loans, the plaintiff commenced this action to enforce the statutory charge by way of an order for sale.

G **[4]** It is thus incumbent upon the defendant to show cause to the contrary to resist the said order for sale. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. His Lordship Gopal Sri Ram JCA at pp 44-46 said:

H > In our judgment, 'cause to the contrary' within s. 256(3) may be established in three categories of cases. First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the code established cause to the contrary ...
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I > Secondly, a chargor may show cause to the contrary within s. 256(3) of the code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the

> chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. Thirdly, a chargor may defeat an application for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Muruggapa Chetiar v. Letchumanan Chettiar* [1938] 1 LNS 42 ...

At p. 47, His Lordship concluded after having discussed *Muruggapa Chettiar*'s case:

> It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar*'s case, the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s. 256(3).

Coming back to the case before me, the defendant mounted a challenge that the plaintiff had failed to adhere to the requirements of O. 83 r. 3 of the Rules of the High Court 1980 (the RHC).

[5] The plaintiff's affidavit in support (Lampiran 3) of his saman pemula (Lampiran 2) was affirmed on 20 January 2005. By para 14 of the same, the plaintiff states that:

> Wang yang dijamin dibawah Gadaian tersebut adalah genap masanya dibayar dan kena dibayar dimana butir-butir jumlah yang terhutang adalah seperti berikut:
>
> **PINJAMAN TERMA** (No. Akaun - 01090000705957)
>
> | | | |
> |---|---|---|
> | (a) Jumlah pinjaman | – | RM119,704.00 |
> | (b) Jumlah pembayaran balik setakat 20.1.2005 | – | RM110,635.15 |
> | (c) Jumlah faedah tertunggak setakat 20.1.2005 | – | RM48,144.31 |
> | (d) Jumlah ansuran tertunggak setakat 20.1.2005 | – | RM70,553.58 |
> | (e) Jumlah baki hutang setakat 20.1.2006 | – | RM244,702.37 |
> | (f) Faedah harian | – | RM53.04 sehari |

A It is very obvious that logically the sum in item (d) should amount to only RM9,069 (item (a) jumlah pinjaman – (less) item (b) jumlah pembayaran balik). However the plaintiff calculated the sum in arrear to be RM70,553.58 (as in item (d)). The amount in arrear defies logic. No explanation to clear the air was forthcoming from B the plaintiff. In the absence of the same, I am with the defendant's submission that the sum in item (d) was plainly in error. Since the basis of the sum in arrear is in error, it follows through that the calculations in respect of item (c) and item (e) is equally erroneous. It is thus very obvious that the plaintiff had C failed to meet the requirement of O. 83 r. 3(b), (c) and (d) of RHC. It is settled that these requirements are mandatory requirements.

[6] The need to follow these requirements to the letter is D enumerated in very plain words by the Court of Appeal in *Sathunavakey v. Oriental Bank Bhd* [2008] 1 CLJ 345, where His Lordship Tengku Baharudin Shah JCA, at pp. 351-352, said:

> In *Citibank NA v. Ibrahim bin Othman (supra)* it was held that on a reading of O. 83 r. 1(a), (b), (c), 3(3) and 3(6) together, it E was incumbent on the Plaintiff to provide the statutory particulars in the first affidavit. To quote Shanker J (as he then was) in that case, "the objective of O. 83 r. 3 is to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make F up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making the order the total amount due to the chargee at the date on which the order was made. These words are from s. 257(1)(c) of the National Land Code 1965 and they are mandatory." The Federal Court approved the ratio in that case in G *Maimunah bte Megat Montak. (supra)*

The same error is also noted in the plaintiff's averment in respect of the overdraft facilities. In the same paragraph the plaintiff states:

H

PINJAMAN OVERDRAF (No. Akaun: 01090009280051)

(a) Jumlah pinjaman	–	RM114,000.00
(b) Jumlah pembayaran balik setakat 20.1.2005	–	RM –
(c) Jumlah faedah tertunggak setakat 20.1.2005	–	RM –

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(d) Jumlah ansuran tertunggak setakat 20.1.2005	–	RM124,074.62
(e) Jumlah baki hutang setakat 20.1.2005	–	RM238,074.62
(f) Faedah harian	–	RM56.98 sehari

The pertinent question now is how was the sum in item (e) (RM238,074.62) arrived at when the amount in item (b) and (c) was not computed and stated there in. It occasioned a real doubt whether the said sum was really due to the plaintiff. It goes without saying that the defendant was equally left in confusion as to what is the exact amount he is legally liable to pay. Again, it is obvious that the plaintiff had failed to meet the requirements under O. 83 r. 3(3)(c) which requires that the account between the chargor and chargee must show the "amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit".

[7] The plaintiff filed a further affidavit, affidavit tertunggak affirmed on 6 September 2005. By para 8 of the same, the plaintiff deposed that:

> 8. Setakat 26.9.2005 tarikh perbicaraan Notis Temujanji untuk mendengar Saman Pemula, Defendan berhutang kepada Plaintiff jumlah wang yang dijamin dibawah Gadaian adalah genap masanya dibayar dan kena dibayar seperti berikut:
>
> **PINJAMAN TERMA**
>
> | | | |
> |---|---|---|
> | (a) Jumlah pinjaman | – | RM119,704.00 |
> | (b) Jumlah pembayaran balik setakat 26.9.2005 | – | RM74,707.30 |
> | (c) Jumlah faedah tertunggak setakat 26.9.2005 | – | RM57,900.11 |
> | (d) Jumlah ansuran tertunggak setakat 26.9.2005 | – | RM86,183.54 |
> | (e) Jumlah baki hutang setakat 26.9.2005 | – | RM258.957.08 |
> | (f) Faedah harian | – | RM53.04 sehari |

Pinjaman Overdraf

(a) Jumlah pinjaman	–	RM114,000.00
(b) Jumlah pembayaran balik setakat 26.9.2005	–	–
(c) Jumlah faedah tertunggak setakat 26.9.2005	–	RM138,748.96
(d) Jumlah ansuran tertunggak	–	RM138,748.96
(e) Jumlah baki hutang setakat 26.9.2005	–	RM252,748.96
(f) Faedah harian	–	RM60.69 sehari

Now the sum in item (b) of affidavit tertunggak affirmed on 6 September 2005 differs substantially from the sum in item (b) of the plaintiff's affidavit in support affirmed on 20 January 2005. The sum in item (b) in affidavit tertunggak amounted to RM74,707.30 whereas the sum in item (b) in affidavit in support amounted to RM110,635.15. The figures given by the plaintiff makes no real sense. It is illogical for the amount of the loan repaid to have decreased to RM74,707.30 about eight months after the accounts was first given through the affidavit in support. No explanation was given to account the differences and learned counsel for the plaintiff makes no submissions on this issue. It appears that the plaintiff took the liberty to change the sum repaid at its own whims and fancies. There can be no doubt that the accounts given by the plaintiff is full of ambiguities, lending credence to the defendant's claim that his account has been manipulated by the plaintiff's own officials. Again if the figure in item (b) of the affidavit tertunggak was dubious or in error, consequentially the figures in items (c), (d) and (e) were equally dubious or erroneous. Since the plaintiff did not issue a certificate of indebtedness, the defendant's accounts as indicated by the plaintiff through the affidavits is thus not conclusive and liable to be challenged.

[8] There can also be no doubt that the plaintiff is again in breach of the requirements of O. 83 r. 3. It leaves the defendant guessing all the way as to the exact amount he is legally liable to pay the plaintiff. The accounts given by the plaintiff is bad in law, incapable of being given due recognition for purposes of enforcing the charge.

[9] In this regard I am fortified by the decision in *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor* [1995] 1 LNS 33, wherein His Lordship Mohd Hishamudin J, said:

> In my opinion, the failure to comply with rr. 3(6) and 3(3), in particular the failure to state:
>
> (a) the amount of the repayments; and
>
> (b) the amount of installments in arrear, are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the Defendants ... Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of installment in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor.

Although this case delved in the failure of the chargee to follow the requirements of O. 83 r. 3(3)(b) and (c), I am firmly of the view that the same principles equally apply in situation whereby the chargee has come up with ambiguous accounts incapable of comprehension, prone to changes/amendments at the whims and fancies of the chargee as is the case presently before me. It is verily an under statement to suggest that the defendant was not prejudiced by the conduct of the plaintiff in preparing his (defendant's) accounts. Equally the plaintiff has not been fair to the defendant all along from the beginning. Evidently the defendant's interest is compromised by the plaintiff's failure to come up with an accurate and firm accounts of his loans.

[10] It is also to be noted that the accounts in para 8 of the plaintiff's affidavit tertunggak was calculated up to 26 September 2005 ("setakat 26 September 2005"). However the said affidavit tertunggak was affirmed on 6 September 2005. Again this is in breach of O. 83 r. 3(3)(c) wherein by the same it is incumbent upon the plaintiff to provide the particulars of the amount of any interest or installments in arrear at the date of the affidavit. The plaintiff clearly failed to provide the defendant's accounts on the date the affidavit tertunggak was affirmed ie, on 6 September 2005.

[11] The defendant also challenged the Form 16D notice. He claimed that his accounts were manipulated by the plaintiff's own officials. There were police investigations resulting in his account being frozen. The defendant further provided evidence that certain

officials of the plaintiff's bank were hauled before a domestic inquiry to answer certain charges ensuing from the said manipulations and that fictitious addresses of his own were created to disbursed monies taken from his accounts in furtherance of the said manipulations as can be seen in exhs. "SM2" and "SM3" of Lampiran 15. As far back as 1998 he had instructed his solicitors to asked from the plaintiff his statement of accounts relating to the said loans, but to no avail, as shown by his solicitors letters dated 27 May 1998 and 4 January 1999, exhibited as "SM4" in Lampiran 15.

[12] Upon receipt of the Form 16D notice dated 6 December 2004 (exh. "Al-4" of Lampiran 3) for the current action, the defendant immediately instructed his solicitors to put up a reply as shown in exh. "SM1" of Lampiran 15, reiterating the allegations of fraud and manipulations of his accounts, the relevant parts reproduced below:

> ...
>
> Dear Sirs,
>
> Notis Dibawah Borang 16D
>
> H.S.(D) 32478, PTD 6845, Mukim Simpang Kanan, Daerah Batu Pahat
>
> We act for Mr. Muthusamy Sinnakaundan of No. 22, Jalan Ara, Taman Makmur, 83000 Batu Pahat, Johor.
>
> Your 16D notice dated 6.12.2004, and your notice of demand dated 8.11.2004 have been handed over to us, with instructions to reply thereto.
>
> We are instructed, that your clients' have previously commenced foreclosure proceeding in respect of the above matter in 1998, in the midst of Police investigations relating to fraud allegedly committed by some bank officials, whereby our client's housing loan account was manipulated, and it is believed that fictitious addresses were used to release funds to third parties, under our client's account.
>
> The whole truth came to light when our client was requested to call at the Police Station at Johor Bahru to assist in the investigations. Likewise many other account holders were also affected.

Our client was subjected to so much of stress and embarrassment when the Investigation Officer informed that the account has been frozen, pending police investigations. All documents and receipts were also taken for investigation purposes.

Sometimes in April 2002, your clients issued a similar notice, through their Solicitors Messrs David Chong & Co. but later decided not to pursue the matter.

We have instructions and are now contemplating a civil suit against your clients for damages.

...

[13] Finally, the defendant deposed that the sum claimed *vide* the Form 16D notice dated 6 December 2004 was inaccurate as it was based upon a fraudulent and manipulated accounts, compounded by the plaintiff's refusal to give him his current statement of accounts, of which the defendant is perfectly entitled to have sight of the same.

[14] However the plaintiff denied the allegations and completely glossed over the issues raised and claimed that it was mere allegation on the part of the defendant without more. However exh. "SM2" and "SM3" are clear indications that there are some truth in the defendant's allegation. But the plaintiff elected not to reply point for point. Equally the plaintiff elected not to give reasons for its refusal to provide the defendant his full statement of accounts of the said loans. Apparently the plaintiff's behavior left much to be desired. As said earlier it lends credence to the defendant's claim that his accounts has been manipulated and that the amount claimed in the notice was inaccurate as it was based upon fraudulent and manipulated accounts.

[15] For all the reasons given, I am of the view that the defendant has successfully established existence of cause to the contrary to resist the order for sale of the said land pursuant to the charge sought by the plaintiff within the requirements of s. 256(3) of the NLC. On account of the same I thus dismissed the plaintiff's application *vide* Lampiran 2 with costs.